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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of DIANE and STEVEN HUFSTEDLER.	
DIANE HUFSTEDLER, Respondent, v. STEVEN HUFSTEDLER, Appellant.	G031245 (Super. Ct. No. 00D005808) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Myron S. Brown, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed as modified.

Donna Bader for Appellant.

Minyard and Morris, Michael A. Morris, Elene Johnston; Snell & Wilmer and Richard A. Derevan for Respondent.

* * *

In January 2000, after an eight and one-half year marriage, appellant Steven Hufstedler and respondent Diane Hufstedler separated. Respondent petitioned to dissolve the marriage and the superior court granted the request. The court subsequently conducted a three-day trial on the reserved issues of permanent child and spousal support, characterization of the parties' assets and calculation of the community's interest in them, plus the parties' rights concerning certain post-separation community expenses and payments. Thereafter, the trial court issued a statement of decision and entered a judgment on the reserved issues in accordance with its findings. Appellant brings this appeal from that judgment. We agree the trial court erred by ordering appellant to pay a percentage of the monetary gifts received from his parents as additional child support and delete that provision from the judgment. In all other respects, the judgment is affirmed.

DISCUSSION

Introduction

Although not raised as a separate issue, appellant suggests the trial court conducted trial in a manner similar to the procedure we recently condemned in *In re Marriage of Dunn* (2002) 103 Cal.App.4th 345. But here, unlike *Dunn*, the court conducted a public trial, receiving testimony and documentary evidence. While the court also accepted oral offers of proof, it did so at the behest of counsel and in the parties presence. In addition, counsel expressly stipulated in writing that the court could consider and receive into evidence "[a]ll evidentiary assertions made by both parties in their trial briefs . . . as offers of proof . . ., including any and all [attached] declarations . . . ." It is now too late to complain about the trial procedure. (*In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002.)

Support Issues

The Child Support Award

Facts

Appellant is an anesthesiologist. The parties' jointly-retained certified public accountant reported appellant earned $251,649 in gross income in 1999 and $207,930 in 2000. These figures included his medical practice income, rental income from a 50-percent interest in commercial property, and annual year-end gifts of $20,000 received from his parents. His combined monthly controllable cash flow for 1999 and 2000 was $19,149. The accountant calculated appellant's monthly cash flow for the first nine months of 2001 to be $22,608, without consideration of any year-end parental gifts.

Citing salary surveys, the accountant concluded appellant's income as an anesthesiologist was lower than other members of his profession. The survey figures ranged from a low of $229,000 to a high of $279,000 in annual income. An Internet survey covering Orange County ranged from $230,000 to $260,000 per year. As for the drop in his 2000 earnings, appellant claimed "he couldn't work as many hours because he had to take care of a child." Respondent's counsel asserted, without objection, that "after [the parties] separated [appellant] started practicing some in Northern California, some down here, and not working at the level he was during the marriage . . . ."

Before marriage, respondent earned a dental hygienist's license and acquired a credential which allowed her to teach at the community college level. She did not work during the marriage. After separation, she started a new business with gross earnings of $5,000 per month. Respondent estimated her net monthly income to be $1,000. The jointly-retained accountant reported respondent had a monthly controllable cash flow of $1,056 for the first nine months of 2001.

The trial court ordered appellant to pay respondent $2,021 a month as child support with step-up increases as the support obligation for his two children from a prior marriage terminated. Also, noting appellant "has received annual monetary gifts from his

parents," the court ordered him to pay as additional child support, "15% of any year-end gifting income and/or monetary gift from his parents."

Analysis

Appellant challenges the award, arguing the court failed to use the statewide uniform child support guidelines to calculate his support obligation, considered his earning capacity instead of his actual monthly income, considered respondent's monthly income rather than her earning capacity, and increased the support award by the amount of any cash gifts received from his parents.

To calculate child support, a court must employ the presumptively correct statutory formula established by Family Code section 4055 unless it states on the record reasons why use of the formula would be unjust or inappropriate under the circumstances of the case. (Fam. Code, §§ 4056 & 4057, subd. (a); *In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 96.) The record does not support appellant's claim the court failed to use the formula in this case.

Respondent submitted a computer analysis calculating child support under the statutory formula which recommended a monthly support order of $2,650. Her analysis assumed appellant had primary physical responsibility for their daughter 15 percent of the time, attributed to him a monthly earning capacity of $20,833 ($250,000 annual income), monthly rental income of $5,000, plus $1,666 for the year-end parental gifts. It also assumed respondent received $1,056 in monthly income. But respondent's analysis did not consider appellant's $1,500 per month support obligation for his other children. Attached to appellant's brief is a computer analysis recommending a monthly child support obligation of $1,265. This analysis assumes appellant has primary physical responsibility for the child 20 percent of the time and attributes to him a monthly income of $15,663 (approximately $188,000 annual income); it does not consider either his rental

income or gift receipts, but does include his other monthly child support obligation and assumes respondent's monthly income to be $4,500.

While the statement of decision neither incorporates a computer analysis nor expressly declares the court employed the statutory formula, appellant does not cite any legal authority requiring it to do so. The court found appellant had a monthly earning capacity of $20,833 and received $5,000 per month in rental income to him, but also acknowledged his $1,500 per month obligation for his other children. The court also found respondent had a monthly cash flow of $1,056. Thus, its findings are within the evidence presented by the parties, and the support order falls approximately midway between the figures proposed by the parties' competing computer analyses. This case is unlike *In re Marriage of Hall* (2000) 81 Cal.App.4th 313, where the court clearly employed a method not authorized by the child support guideline. (*Id.* at p. 318.)

Next, appellant attacks the court's use of his earning capacity rather than actual income to calculate support. Family Code section 4058, subdivision (b), states a court "may, in its discretion, consider the earning capacity . . . in lieu of the parent's income." This approach did not constitute a departure from the guideline which triggered a requirement the court find special circumstances for doing so. (*In re Marriage of LaBass & Munsee* (1997) 56 Cal.App.4th 1331, 1336-1337.) The record also supports the court's approach. Appellant's medical practice income fell at the lower end of the compensation received by anesthesiologists, and the dramatic fall in his earnings between 1999 and 2000 supported the court's finding that he "voluntarily reduced his income." The court was not obligated to either accept his explanation for the reduction in income or find his decision was in the child's best interest.

Appellant's third complaint is that the court erred by considering respondent's actual income rather than her earning capacity. This is simply an attempt to reargue the facts. While respondent had acquired employable job skills, she did not work during the eight and one-half years of the parties' marriage. Reactivating her dental

hygienist license and teaching certificate for that field would have required taking continuing education courses. She decided to change course and start what she described as a data resource business. The parties' jointly-retained accountant verified respondent's monthly controllable cash flow from it was $1,056. The evidence supported the court's decision in this respect as well.

Finally, appellant attacks the court's consideration of the $20,000 annual monetary gifts received from his parents. Contrary to appellant's claim, the trial court did not double count this amount by using it to calculate his monthly support obligation and then requiring him to pay 15 percent of the gift proceeds as additional child support. The statement of decision reflects the court based the monthly support order on the facts cited above and mentioned the gift proceeds only after setting the support amount. Appellant did not dispute the computation of child support when objecting to the proposed statement of decision, thus any ambiguity in this respect is waived. (*In re Marriage of Schulze* (1997) 60 Cal.App.4th 519, 528.)

Alternatively, appellant contends the court erred by ordering him to pay 15 percent of any year-end monetary gifts as additional child support. He did object to this portion of the trial court's statement of decision, and we find his complaint has merit. Typically, monetary gifts are not deemed income for the purpose of calculating a parent's child support obligation. Family Code section 4058, subdivision (a), which describes annual gross income for the purpose of calculating child support, does not mention cash gifts. *In re Marriage of Schulze, supra,* 60 Cal.App.4th 519 suggests, "[g]ifts are not mentioned in section 4058, and, judging from the use of language lifted straight from the Internal Revenue Code, should logically be outside the purview of the child support statute." (*Id.* at p. 529, fn. omitted.) Recently, Division Two of this District held "gifts . . . are not within the scope of the statutory definition of income" for the purpose of determining a parent's gross income. (*In re Marriage of Scheppers* (2001) 86 Cal.App.4th 646, 649.)

That is not to say the gift income is irrelevant in calculating child support. As a potential income-producing asset, a cash gift might be considered in determining the obligor's earning capacity. (*Mejia v. Reed* (2003) 31 Cal.4th 657, 671; *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 291-292.) Also, a court may use it as a special circumstance to justify a departure from the guideline formula. (*Mejia v. Reed, supra,* 31 Cal.4th at p. 671; *In re Marriage of Loh* (2001) 93 Cal.App.4th 325, 331-332.)

But here, the record does not show appellant had additional assets not considered in calculating his earning capacity. Nor did the court make the statutorily mandated findings necessary to depart from the support guideline. (Fam. Code, § 4056, subd. (a); *In re Marriage of Hall, supra,* 81 Cal.App.4th at pp. 318-319.) There is no suggestion appellant was shirking his child support obligation by keeping his own income unreasonably low, while maintaining a wealthy lifestyle through lavish parental gifts. (See *In re Marriage of Schulze, supra,* 60 Cal.App.4th at p. 530, fn. 10.) The court erred in awarding "additional child support" based on appellant's year-end parental gifts.

Spousal Support

The trial court ordered appellant to pay respondent $3,500 per month in spousal support for two years "at which time [she] is expected to be self-supporting." Both parties agree a permanent spousal support award must be based on the factors listed in Family Code section 4320. (*In re Marriage of Zywiciel* (2000) 83 Cal.App.4th 1078, 1081.) Appellant contends the court erred by failing to both consider the statutory factors and awarding an amount more than requested by respondent.

The record does not support his first claim. The parties' trial briefs cited the factors they felt were relevant in calculating spousal support. Appellant's attorney also mentioned Family Code section 4320 during argument at trial. While the trial court did not specifically state it was applying the statutory factors, the statement of decision mentions several of them, including the parties' relative earning capacity, duration of the

marriage, and the time needed for respondent to become self-sufficient. (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 902.) Absent anything to the contrary, we must conclude the court followed the law. (*Id.* at pp. 898-899.) While appellant objected to the statement of decision's finding as to the amount of spousal support, he did not contend the award was erroneous because the court failed to identify or discuss the relevant statutory factors.

Appellant's second argument also lacks merit. His trial brief argued that since he "has been paying support . . . for the past 15 months," his obligation "should continue no longer than a period of 2 years and 11 months . . . ." Respondent requested "spousal support of $3,000 be ordered for a period of thirty-six . . . months . . . ." During trial, respondent's counsel asserted "two more years at $3,000 is probably not an inappropriate number . . . ." The trial court's conclusion to award $3,500, but for only two additional years, was within the parameters of the parties' contentions.

Property Issues

Respondent's Reimbursement for the Insurance Lawsuit Settlement

During the marriage, the parties purchased a home. The trial court calculated the community's equity interest in the home by subtracting the property's two recorded encumbrances plus $241,605, a sum respondent had contributed to the property's acquisition. The court found respondent was entitled to reimbursement for the latter amount because it constituted "a bad faith insurance claim derivative to a personal injury claim which claim arose before marriage." Appellant challenges the reimbursement award, arguing that, while the car accident resulting in respondent's personal injuries occurred before marriage, the bad faith action arose from the insurer's alleged interference with respondent's policy rights after the parties married.

The characterization of a spouse's settlement proceeds depends on when the right of action accrued, not when the spouse filed suit or reached a settlement of the

claim. (*Foote v. Foote* (1959) 170 Cal.App.2d 435, 438-439; *In re Clark's Estate* (1928) 94 Cal.App. 453, 459.) "[M]oney and other property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is community property if the cause of action for the damages arose during the marriage." (Fam. Code, § 780.)

The record supports the conclusion that respondent's right of action against her insurer arose before marriage. The draft complaint for that lawsuit which respondent submitted at trial contained causes of action for breach of the duty of good faith and fair dealing, breach of contract, and professional negligence relating to the actions of one of the insurer's claims representatives. Respondent alleged she suffered injuries in a September 1990 car accident; at the time, respondent was covered by an automobile insurance policy which, inter alia, provided $300,000 in underinsured motorist coverage; respondent's attorney contacted her insurer in October, noting the person responsible for the accident had either no insurance or inadequate insurance and announced respondent was asserting a "claim . . . under the uninsured/underinsured motorist provisions" of the policy (bold and underscoring omitted); between March and May of 1991, counsel sent the insurer copies of respondent's medical bills which, at that point, exceeded $50,000; a claims representative responded by letter in early June stating respondent had already exhausted the policy's $5,000 medical benefits coverage and she needed to resolve any outstanding balances with the treating physicians; over the next several years, the insurer continued to dispute its obligation to provide further policy benefits to respondent and assert rights precluded to it under the policy's underinsured motorist clause.

"Generally speaking, a cause of action for breach of contract accrues at the time of the breach. [Citations.]" (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 831.) When the action is based on a failure to pay policy benefits, accrual occurs when the insurer denies benefits to the insured. (*Neff v. New York Life Ins. Co.* (1947)

30 Cal.2d 165, 170; see *Lawrence v. Western Mutual Ins. Co.* (1988) 204 Cal.App.3d 565, 575.) Much of the insurer's allegedly wrongful conduct occurred after the parties married. But respondent initially made a claim under her policy's underinsured motorist coverage in late 1990 and, relying on the policy's $5,000 medical benefits limitation, the insurer denied benefits to her in early June 1991, before the marriage. Thus, respondent's right of action against the insurer arose before marriage, and the subsequent settlement of that claim constituted her separate property for which she could receive reimbursement. (Fam. Code, § 2640, subd. (b).)

Appellant contends the court erroneously relied on the date of the car accident to find the bad faith settlement proceeds constituted respondent's separate property. Since we generally review judicial action, not judicial reasoning, a reversal is not required where the record establishes a trial court reached the correct result even if it did so for the wrong reason. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 981.)

The Parental "Loans" to the Community

The trial court rejected appellant's claims the community was obligated to repay his parents for certain sums they allegedly "loaned" to the parties. Appellant attacks these rulings on appeal.

Facts

The first repayment claim concerned commercial property located in San Juan Capistrano. Appellant's father, an attorney, testified he purchased the property in the 1960's under an "oral understanding" with Allen Schwartz, a developer and long-time acquaintance, that the father "would put up the necessary money to develop the project," while Schwartz "would . . . build it out" and "manage" the property "until . . . I had been paid out substantially and we could put the property in both our names." This

understanding notwithstanding, the father quitclaimed the property's title to appellant in 1976. Appellant did not deed a one-half interest in the property to Schwartz until 1989. He subsequently transferred his one-half interest to himself and respondent.

At trial, appellant's father testified he invested over $700,000 to develop the lot between 1976 and 1997, claiming the payments were made "with the . . . understanding that if and when the property is prepared to the point it can make an income," appellant and Schwartz "would convert that money, that debt that they owed me, to a capital investment . . . ." In the absence of such an agreement, the father claimed his investment "remained as a loan and [appellant and Schwartz] would repay it over a period of time at some appropriate interest." Both Schwartz and appellant's father admitted there was no documentation memorializing the parties' "understanding." Since the property began generating income in 1997, Schwartz had sent appellant's father a check each month, made payable to "S. Hufstedler," for one-half of the income. In turn, Mr. Hufstedler sent the check to appellant.

Appellant requested the court award the community's one-half interest in the commercial property to him "less . . . encumbrances," including his father's "capital contribution" to its development. Respondent disputed the existence of a legal obligation to repay appellant's father, in part arguing the father's investment constituted a gift. In its statement of decision, the court awarded the San Juan Capistrano property to appellant, but found his father "is not a party to this action," "[t]here is no writing regarding monies owed . . . to [appellant's] father in connection with the San Juan Capistrano property," nor were there any "encumbrances of record against the . . . property other than leasehold interests . . . ."

The second repayment claim relates to a transaction where appellant's parents wired $200,000 to the parties to assist in building a new home. Again, appellant described this sum as a loan while respondent asserted it was a gift. The court found that

except for the $1,068,747 "first mortgage," and $200,000 "second mortgage," "[t]here are no other recorded encumbrances" against the parties' residential property.

Analysis

The nature of the foregoing financial transactions presented factual questions for the trial court to decide based on the evidence presented at trial. (*In re Marriage of Saslow* (1985) 40 Cal.3d 848, 865-866; *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 842-844; *Matson v. Jones* (1969) 272 Cal.App.2d 826, 829.) On appeal, we review its findings under the substantial evidence rule. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) The evidence supports an inference these payments constituted gifts.

The Tax Loss Carry Forwards

Before marriage, appellant owned a business which generated substantial losses. During marriage, the parties filed joint tax returns in which they declared tax loss carry forwards for the business's losses. At trial, appellant sought reimbursement for $50,000 in tax loss carry forwards, arguing the community received a benefit in this amount. Respondent argued the deductions declared during marriage should be treated as a gift. The trial court found the tax loss carry forwards constituted a community asset and refused appellant's reimbursement request.

As just noted, the issue of whether certain property donations constituted gifts presented factual questions. Contrary to the assertion in appellant's opening brief, the parties were not obligated to file joint tax returns during marriage. The limited evidence presented through the parties' offers of proof supports the trial court's finding and appellant has failed to establish it erred in doing so.

The Trial Court's Resolution of Community Credits and Charges

On the second day of trial, the parties' attorneys informed the court, "we are going to attempt to . . . wrap up the remaining issues . . . by way of a combination of offer[s] of proof . . . interspersed with some . . . argument . . . ." The issues covered included the parties' competing reimbursement claims concerning their post-separation payments of community obligations and use of community assets.

To encourage the payment of debts after separation, "'a spouse who, after separation of the parties, uses earnings or other separate funds to pay preexisting community obligations should be reimbursed therefor out of the community property upon dissolution. . . .'" (*In re Marriage of Epstein* (1979) 24 Cal.3d 76, 84 [*Epstein* credits]; see also Fam. Code, § 2626.) Alternatively, where a spouse has exclusive use of a community asset between separation and trial, "the community [is] entitled to reimbursement for the value of the exclusive use of . . . [the] community asset . . . ." (*In re Marriage of Watts* (1985) 171 Cal.App.3d 366, 373-374 [*Watts* charges].)

In its statement of decision, the trial court ordered "Epstein credits . . . allocated to each party per the proof provided . . . ." As for the parties' postseparation use of community property, it found "Watts charges are discretionary and in this case not equitable." Appellant challenges both of these findings.

Contrary to appellant's suggestion, the court's statement of decision did express the basis for its award of *Epstein* credits and denial of *Watts* charges, albeit in a very succinct manner. Since appellant failed to object to the statement of decision's findings on these issues, we presume a trial court's finding are correct and indulge all intendments and presumptions in support of its judgment. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.)

While appellant's arguments amount to an attack on the sufficiency of the evidence to support the trial court's findings, respondent notes his opening brief failed to set forth all of the relevant evidence on these issues. A reviewing court presumes the

evidence supports the judgment, and an appellant must set forth all of the material evidence on the points challenged, not merely the evidence favorable to his or her position. (*Kanner v. Globe Bottling Co.* (1969) 273 Cal.App.2d 559, 564; *Davis v. Lucas* (1960) 180 Cal.App.2d 407, 409.) We need not search the record to ascertain whether it sustains appellant's contentions. (*Eistrat v. J.C. Wattenbarger & Sons* (1960) 181 Cal.App.2d 57.) Since appellant failed to summarize all of the material evidence, we may deem his challenge to the sufficiency of the evidence concerning the *Epstein* credits and the *Watts* charges waived. (*Kanner v. Globe Bottling Co., supra,* 273 Cal.App.2d at p. 564; *Davis v. Lucas, supra,* 180 Cal.App.2d at pp. 409-410.)

But even a limited review of the record shows appellant's arguments lack merit. As for the *Epstein* credits, he complains the trial court credited him with only a $3,500 expense for respondent's eye surgery out of the more than $50,000 in expenses for which he sought reimbursement. This argument misstates the record. In his trial brief, appellant sought recovery for his payment of charges incurred on the parties' credit cards and the court also credited him with over $16,700 for this claim.

Concerning the denial of *Watts* charges, appellant sought to have respondent's community interest reduced by the residence's fair rental value for her post-separation occupation of the home. During trial, in response to this contention, respondent's attorney listed her claims for reimbursement from appellant for the community's payment of appellant's separate debts plus the post-separation expenses she allegedly paid. Respondent offered to waive recovery of a number of these items, stating "I think we are walking away from a number of things here in an equitable manner . . . ." The court apparently agreed, finding appellant's *Watts* charge request "not equitable." Given the conflicting claims by the parties on these issues, we cannot say the court's rulings were error.

DISPOSITION

The portion of the judgment ordering appellant to pay respondent 15 percent of any year-end gifts received from his parents as additional child support is deleted. As so modified, the judgment on reserved issues is affirmed. Respondent shall recover her costs on appeal.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.